85-852

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. _____

PRESTON CARROLL COMPANY, INC., and
C.F.W. CONSTRUCTION COMPANY, INC.,
Petitioners for Certiorari

v.

MORRISON ASSURANCE COMPANY, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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v.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

QUESTION PRESENTED

Will Fourteenth Amendment due process protect a party from the retrospective application of state supreme court decisional law which abrogates earlier state supreme court decisonal law upon which that party reasonably relied when retrospective application deprives the party of all opportunities to enforce its rights under a contract?

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PREAMBLE

Come now the Petitioners, Preston Carroll Company, Inc., and C.F.W. Constructon Company, Inc., (hereinafter referred to as the "Joint Venture")[1] by and through their undersigned counsel, and pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Georgia entered in the case of Morrison Assurance Company v. Preston Carroll Company, Inc., et al., No. 42060 (June 19, 1985), and the denial of said petitioners' motion for rehearing by the Supreme Court of Georgia dated July 23, 1985.

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[1]Pursuant to Rule 28.1, petitioners inform the Court that Preston Carroll Company, Inc., is a wholly-owned subsidiary of Preston Carroll Enterprises, Inc., a Tennessee corporation. CFW Construction Company, Inc., is a wholly-owned subsidiary of Carter, Ltd., a Tennessee corporation.

CITATIONS TO OPINIONS BELOW

The April 13, 1984 Order of the trial court granting respondent's motion for summary judgment against the petitioner Joint Venture is unreported and is printed in Appendix B hereto, infra, p. 27. The opinion of the Georgia Court of Appeals in Preston Carroll Company, Inc., et al. v. Morrison Assurance Company, printed in Appendix B hereto, infra, p. 28, is reported in 173 Ga. App. 412 (326 S.E.2d 486) (1985). The opinion of the Georgia Supreme Court in Morrison Assurance Company v. Preston Carroll Company, Inc., et al., printed in Appendix B hereto, infra, p. 37, is reported in 254 Ga. 608 (1985).

JURISDICTION

The judgment of the Georgia Supreme Court was entered on June 19, 1985,

p. 37, infra. The Joint Venture's motion for rehearing was denied on July 23, 1985, p. 40, infra. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) which allows review by this Court by Writ of Certiorari "where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

STATUTES INVOLVED

The statutory provisions involved are the Fourteenth Amendment to the United States Constitution, O.C.G.A. §§ 10-7-22 and 10-7-24, which statutes are printed in Appendix A, infra, pp. 24-26.

STATEMENT

The Joint Venture petitions this Court for a Writ of Certiorari to the

Georgia Supreme Court to review a decision of the Georgia Supreme Court which has denied the Joint Venture Fourteenth Amendment due process of law by virtue of its retrospective application of its decision of Balboa Insurance Company v. Kellos Construction Company, 247 Ga. 393, 276 S.E.2d 599 (1981), to the Joint Venture which irrevocably deprived the Joint Venture of any opportunity to enforce its rights under a surety bond issued by the respondent Morrison Assurance Company (hereinafter, the "surety").

The Joint Venture alleged such a due process deprivation at the onset in its memorandum of points and authorities in opposition to the surety's motion for summary judgment filed in the trial court in Symons Corporation v. Simplicity Builders, Inc., et al., Civil Action No. 786053 (Fulton State Court) (pp. 51-55).

The Joint Venture renewed its constitutional argument in its

appellant's brief and reply brief filed in the Georgia Court of Appeals (pp. 44-50), which were incorporated into the record upon certiorari to the Georgia Supreme Court. Finally, the Joint Venture reiterated its due process arguments once again orally before the Georgia Supreme Court as well as in writing in the Joint Venture's motion for rehearing (pp. 41-44).

This dispute arose in the context of a suit by an unpaid supplier of the surety's principal, Simplicity Builders, Inc., ("Simplicity"), against the Joint Venture and its bonding company, and Simplicity, and its two bonding companies, one of which was the instant surety. Symons Corporation v. Simplicity Builders, Inc., et al, supra. Earlier, Simplicity had been terminated as a subcontractor of the Joint Venture for non-performance, and the Joint Venture had made demand upon the surety to honor its performance and payment bonds issued in favor of the Joint Venture as obligee.

In response to that demand, the surety in a letter dated March 28, 1980, requested the Joint Venture to initiate suit against the surety's principal, Simplicity, pursuant to O.C.G.A. § 10-7-24 which provides that a surety "any time after the debt on which he is liable becomes due, may give notice in writing to the creditor to proceed to collect the debt from the principal and if the creditor fails to commence an action for the space of three months after such notice the surety giving notice is discharged."

The Joint Venture did not initiate suit against Simplicity in compliance with the surety's notice, and in the subsequent litigation, the Joint Venture asserted breach of contract claims against Simplicity and the surety by cross-claim seeking damages in excess of $200,000. In response, the surety filed a motion for summary judgment invoking the Georgia Supreme Court's decision in Balboa Insurance Company v. A. J. Kellos

Construction Company, supra, claiming a discharge under O.C.G.A. § 10-7-24 due to the failure of the Joint Venture to file suit against Simplicity within three months of the surety's statutory notice. In rebuttal, the Joint Venture in written and oral arguments contended that the 1981 decision in Balboa should not be applied retrospectively to the Joint Venture since to do so would divest it of contract rights in violation of state decisional and federal constitutional law.

Upon appeal to the Georgia Court of Appeals, the Joint Venture argued that the trial court had erroneously applied Balboa retroactively in violation of the doctrine of nonretroactivity as enunciated in the United States Supreme Court's decision of Chevron Oil Company v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed. 2d 296 (1971), as adopted by the Georgia Supreme Court in Flewellen v. Atlanta Casualty Company, 250 Ga. 709, 300 S.E.2d 673 (1983), the result

of which was (1) complete and irrevocable disenfranchisement of the Joint Venture's vested rights under a contract; and (2) a violation of the Joint Venture's right to due process under the Fourteenth Amendment.

The Court of Appeals in Preston Carroll Company, et al., v. Morrison Assurance Company, 173 Ga. App. 412 (323 S.E.2d 486) (1985), reversed the trial court's judgment noting that Balboa was inconsistent with the Georgia Supreme Court's earlier holding in Houston General Insurance Company, et al. v. Brock Construction Co., Inc., 241 Ga. 460, 246 S.E.2d 316 (1978) since no case prior to Balboa had actually held that the discharge provision of O.C.G.A. § 10-7-24 applied to compensated sureties, and that the common law of the State of Georgia prior to the enactment of such discharge provision neither compelled the creditors to sue a principal at the request of the surety nor discharged the

surety for the creditor's failure to commence such an action. Since the Balboa holding was not reasonably foreshadowed by the Supreme Court's earlier holding in Houston, the Court of Appeals found that the Joint Venture's reliance upon Houston was justifiable and that retroactive application of Balboa was unwarranted in light of the resulting forfeiture of the Joint Venture's rights under the bond. 175 Ga. App. at 414. The Court of Appeals in applying the doctrine of nonretroactivity in favor of the Joint Venture did not address the Joint Venture's due process argument.

Upon application of the respondent surety, the Georgia Supreme Court took the case under review pursuant to a writ of certiorari, and subsequently reversed the Court of Appeals' decision in Morrison Assurance Company v. Preston Carroll Company, Inc., et al., 254 Ga. 608 (1985) finding that the Balboa

holding was foreshadowed by the language in Houston, and finding therefore that the trial court did not err in granting summary judgment in favor of the respondent surety. The Supreme Court's holding further conspicuously ignored the Joint Venture's due process arguments which had been contained in the record before it, reiterated in oral argument, and further advanced in a motion for rehearing which was denied July 23, 1985.

REASONS FOR GRANTING THE WRIT

1.

The retrospective application of the Georgia Supreme Court's decision in Balboa to the Joint Venture deprives the Joint Venture of all remedies for the enforcement of its rights under the surety's bond in violation of the due process clause of the Fourteenth Amendment.

While prospective or retrospective application of state laws by a state

supreme court is not, in and of itself, violative of the Fourteenth Amendment, Great Northern Railway Company v. Sunburst Oil & Refining Company, 287 U.S. 358, 77 L.Ed. 360, 53 S.Ct. 145 (1932), it will if the law established by the "overruling" decision in combination with the procedural circumstances which existed before the overruling case was decided have the total effect of denying a party all remedies for the enforcement of its rights. Brinkerhoff-Faris Trust & Saving Company v. Hill, 281 U.S. 673, 74 L.Ed. 1107, 50 S.Ct. 51 (1930).

In Brinkerhoff, appellant bank acting as trustee for its shareholders brought suit in a Missouri State Court against a county tax assessor to enjoin him from collecting a certain portion of the taxes assessed against said shareholders on the share of their bank stock. Alleging discriminatory taxation, the bank contended that it had no other legal remedy under state law.

The trial court refused the injunction and dismissed the bank's complaint without opinions or findings of fact. On appeal, the Supreme Court of Missouri held that the bank had had a legal remedy by which it could have appealed the allegedly discriminatory tax assessment to the state tax commission, and could have obtained a hearing in relief upon its complaint all as provided by state law. As such,the Supreme Court of Missouri held that the bank had had an adequate remedy at law, and affirmed the trial court's judgment.

On certiorari to the United States Supreme Court, the bank pointed out that it had relied upon a Missouri Supreme Court decision issued six (6) years earlier which had held that the state tax commissioner did not have the authority to grant relief from discriminatory taxation, which case had been overruled by the Missouri Supreme Court in the instant Brinkerhoff case,

and under state law it was now too late for the bank to submit the matter to the state tax commissioner.

In short, the bank in Brinkerhoff like the Joint Venture in the case at bar, had relied upon a previous ruling of the highest court in the state in seeking to enforce its rights under state law. Just as in Brinkerhoff where the time had run for the bank to seek an adjustment of the discriminatory tax rates before the state tax commission at the time the Missouri Supreme Court overruled its previous decision, the Joint Venture in the instant case was faced with a similar dilemma wherein what amounts to a three-month statute of limitation was applied to it in making any claim under the bond upon notice to sue from the compensated surety, the instant respondent, and that time had already run. Where the bank in Brinkerhoff, had relied upon the Missouri Supreme Court's earlier decision which had held that the state

tax commissioner had no power to remedy the discriminatory taxation, the Joint Venture similarly relied upon the Houston holding that Title 103 of the Georgia Code Annotated, of which the statutory predecessor[2] of O.C.G.A.

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[2]During this litigation, the Georgia Legislature changed publishers of the Georgia Code. Title 103 of the Georgia Code Annotated entitled "Suretyship" was superceded by Chapter 7 of the Official Code of Georgia Annotated with the same title. Ga. Code Ann. § 103-205 is the statutory predecessor of O.C.G.A. § 10-7-24, and the terms of each statute are identical.

§ 10-7-24 is a part, did not apply to compensated sureties.[3]

In an opinion by Justice Brandise, the Brinkerhoff Court reversed the ruling of the Missouri Supreme Court on the grounds that said court had deprived the bank of due process by depriving it of its only remedy available for the enforcement of its rights to prevent a seizure of its property. The Court noted that if the state court judgment were permitted to stand, the deprivation

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[3]The Georgia Supreme Court in Houston General Insurance Co. v. Brock Construction Company, Inc., 241 Ga. 460, 246 S.E.2d 316 (1978), in a case construing a companion section of Title 103, Ga. Code Ann. 103-203 [O.C.G.A. § 10-7-22], held that Title 103 of the Georgia Code Annotated had not been intended by the Legislature to govern compensated sureties. 241 Ga. at 463. Instead, the Court noted that "the surety law for compensated sureties must be found in the common law of this State," and concluded its analysis by holding that "[w]hether particular rules established under that Title [Title 103] differ from the law to be applied to compensated sureties must be decided on a case-by-case basis." 241 Ga. at 464.

of the Bank's property would be accomplished without it ever having had an opportunity to be heard. In reversing the Missouri Supreme Court, Justice Brandise enunciated the following doctrine circumventing the power of state supreme courts to retrospectively apply their decisional law by the constitutional considerations of due process. He stated that:

> Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense--whether it has had an opportunity to present its case and be heard in its support. Undoubtedly, the State Court had the power to construe the statute dealing with the State Tax Commission; and to reexamine and overrule the Laclede Land & Improv. Co. Case [the case upon which the bank had previously relied]. Neither of these matters raises a federal question, neither is subject to our review. But, while it is for the state courts to determine the objective as well as the substantive laws of the state, they must, in so doing accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not

> deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy unless there is or was, afforded to him some real opportunity to protect it. (emphasis added).

280 U.S. at 681-2, 74 L.Ed. 14.

Brinkerhoff applied to the instant case demands the same conclusion. The Joint Venture has been denied its rights to be heard, its day in court, due to the retroactive application of Balboa. Relying as it did upon the Houston holding, the Joint Venture fell victim to the same deprivation which the Brinkerhoff bank experienced in the Missouri Court: a change in the rules so fundamental as to deprive each plaintiff of its constitutional guarantee to due process of law under the Fourteenth Amendment.

Prior to Balboa, the Joint Venture's rights as an obligee to the Morrison performance bond were governed by the terms of that bond as construed by the Houston decision which had held

that Georgia suretyship law contained in Title 103 of the Georgia Code Annotated did not apply ipso facto to compensated sureties but that only when state common law coincided with any particular section of Title 103 would that section be applicable to compensated sureties. Relying on that holding, the Joint Venture did not file suit since at common law a compensated surety had no right to compel suit by a creditor against the surety's principal upon notice to that creditor. Howard v. Brown, 3 Ga. 523, 529 (1847). However, Balboa completely abrogated the Houston holding by applying O.C.G.A. § 10-7-24 to compensated sureties without regard for or even mention of the state's common law.

The results have been unequivocal and dramatic. The Joint Venture's rights under Morrison's bond have been automatically forfeited by the retrospective application to it of the Balboa decision which amounts in this

case for these reasons to a taking without due process of law in violation of the Fourteenth Amendment under Brinkerhoff.

2.

However, the question raised in this petition has acquired an importance which far exceeds the parameters of the instant case.

It presents an opportunity for this Court to clarify its holding in Chevron Oil which implied although failed to state that Fourteenth Amendment due process was an intrinsic consideration of the third prong of its analysis which would deny retrospectivity in order to "preserve [the party's] right to a day in court." 404 U.S. at 108, 92 S.Ct. at 356.

The Georgia Supreme Court, although presumably paying lipservice to Chevron Oil in noting that "the Balboa

resolution was foreshadowed by the language used in Houston,"[4] completely ignored the constitutional ramifications of its decision notwithstanding the unquestionable deleterious affect which its decision had on the rights of the Joint Venture. Brinkerhoff mandates the intervention of Fourteenth Amendment due process when a state's judiciary deprives a party of all existing remedies for the enforcement of a property right where that party has had no opportunity to protect it. 28 U.S. at 682, 74 L.Ed. at 1114.

Clearly the Joint Venture was deprived of that opportunity by the retrospective application of Balboa by the Georgia Supreme Court. In doing so, the Georgia Supreme Court ran roughshod over the Joint Venture's rights to due process under the Fourteenth Amendment, "the root requirement" of which is "that

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[4]Morrison Assurance Company v. Preston Carroll Company, Inc., et al., 254 Ga. 608, 609 (1985).

an individual be given an opportunity for a hearing before he is deprived of any significant property interest." (emphasis added). Boddie v. Connecticut, 401 U.S. 371, 379, 91 SCt. 780, 786, 28 L.Ed. 2d 113 (1971).

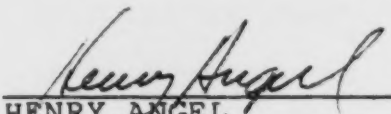
Certainly if Fourteenth Amendment due process is to have any practicable viability outside of the federal courts in the protection of property interests within the Chevron Oil doctrine of nonretroactivity it must be reckoned with when those property rights are forfeited by the retrospective application of state decisional law.

In short, this case poses the rather unique question as to the limits of state decisional power, the exercise of which results in the forfeiture of contract rights where a party has not only had no opportunity to be heard, but has had no real opportunity to exercise its rights under state law in the protection of that right to be heard.

CONCLUSION

For the foregoing reasons the Petitioner Joint Venture urges the Court to grant its Petition for a Writ of Certiorari.

Respectfully submitted,

By: 
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AFFIDAVIT OF SERVICE

Comes now Henry Angel, who after being duly sworn deposes and states:

I have this day served Dewitte Thompson, Esq., Attorney for Morrison Assurance Company with three copies of this amended PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA by depositing copies of same in the United States Mail with adequate postage thereon addressed as follows:

Dewitte Thompson, Esq.
Suite 480, 300 Buckeye Road
Atlanta, Georgia 30341

This 14th day of November, 1985.

Henry Angel
HENRY ANGEL
Attorney for Petitioners

Sworn to and subscribed before me this 14th day of November, 1985.

Judith F. Rubling
Notary Public
Notary Public, Georgia, State at Large
My Commission Expires July 25, 1987

APPENDIX "A"

1. AMENDMENT XIV - . . .
   DUE PROCESS . . .

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. 28 USC § 1257. STATE COURTS; APPEAL; CERTIORARI

Final Judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . .

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commisson held, or authority exercised under, the United States.

3. O.C.G.A. § 10-7-22. DISCHARGE OF SURETY BY INCREASE OF RISK.

Any act of the creditor, either before or after judgment against the principal, which injures the surety or increases his risk or exposes him to greater liability shall discharge him; a mere failure by the creditor to sue as soon as the law allows or neglect to

prosecute with vigor his legal remedies, unless for a consideraion, shall not release the surety.

4. O.C.G.A. § 10-7-24. REFUSAL TO SUE PRINCIPAL AFTER NOTICE BY SURETY AS DISCHARGE

Any surety, guarantor, or endorser, at any time after the debt on which he is liable becomes due, may give notice in writing to the creditor, his agent, or any person having possession or control of the obligation, to proceed to collect the debt from the principal or any one of the several principals liable therefor; and, if the creditor or holder refuses or fails to commence an action for the space of three months after such notice (the principal being within the jurisdiction of this state), the endorser, guarantor, or surety giving the notice, as well as all subsequent endorsers and all cosureties, shall be discharged. . . .

APPENDIX "B"

1. SYMONS CORPORATION V. SIMPLICITY BUILDERS, INC., ET AL., CIVIL ACTION NO. 786053 (FULTON STATE CT., APRIL 13, 1984).

"This case having been brought before this Court on Morrison Assurance Company's Motion for Summary Judgment with respect to the cross-claim of defendants Preston Carroll Company, Inc., d/b/a Preston Carroll Construction & CFW Construction Company, arguments by both parties having been heard, it is hereby ORDERED

That the Motion for Summary Judgment is granted, there being no genuine issue of a material fact and Morrison Assurance Company is entitled to Judgment in its favor as a matter of law.

SO ORDERED, this 13th day of April, 1984.

CHARLES R. CARNES, JUDGE
Fulton State Court

2. 69086. PRESTON CARROLL COMPANY, INC., ET AL., v. MORRISON ASSURANCE COMPANY, 173 Ga. App. 412, 326 S.E2d 486 (1985).

Deen, Presiding Judge.

"The appellants, Preston Carroll Company, Inc. and CFW Construction Company, Inc., formed a joint venture and contracted with the Clayton County Water Authority for the construction of a waste water effluent field. On May 10, 1979, the appellants entered into several subcontracts with Simplicity Builders, Inc. (Simplicity), for part of the work under the water authority contract. The appellee, Morrison Assurance Company, a compensated surety, issued performance and payment bonds for Simplicity's sake, in the amounts of $171,814 and $79,699.

On February 25, 1980, the appellants terminated the various subcontracts with Simplicity due to the latter's alleged multiple breaches of the contract. Subsequently, the

appellants requested that the appellee honor the performance and payment bonds by completing Simplicity's work and paying the outstanding bills for materials. On March 28, 1980, the appellee demanded that the appellants first initiate suit against Simplicity; the appellants never heeded the demand.

On March 4, 1981, an unpaid supplier of Simplicity filed suit against the appellants, Simplicity, and their respective bonding companies. The appellants in turn asserted a cross-claim against the appellee for its refusal to honor the performance and payment bonds. The appellee eventually moved for summary judgment on the cross-claim, on the basis that it was discharged from its obligations under its performance and payment bonds because of the appellant's failure to file suit against Simplicity within three months of the surety's demand, and this appeal followed from the trial court's grant of that motion. Held:

O.C.G.A. § 10-7-24 (formerly Code Ann. § 103-205) provides that "[a]ny surety, guarantor, or endorser, at any time after the debt on which he is liable becomes due, may give notice in writing to the creditor. . . to proceed to collect the debt from the principal . . .; and, if the creditor or holder refuses or fails to commence an action for the space of three months after such notice (the principal being within the jurisdiction of this state), the endorser, guarantor, or surety giving the notice, as well as all subsequent endorsers and all cosureties, shall be discharged." On April 8, 1981, the Supreme Court held that this section applies to compensated as well as uncompensated sureties. Balboa Ins. Co. v. A.J. Kellos Constr. Co., 247 Ga. 393 (276 SE2d 599 (1981).

In the instant case, it is undisputed that the appellants failed to proceed against Simplicity (which was within the state's jurisdiction) within

three months of the notice given by the appellee in March, 1980. Under the above authority, without more, the appellee would be entitled to summary judgment as a matter of law.

However it also appears uncontroverted that, in failing to commence any action against the principal following the notice given by the surety, the appellants relied upon Houston Gen. Ins. Co. v. Brock Constr. Co., 241 Ga. 460 (246 SE2d 316) (1978), in which the Supreme Court held that Title 103 does not apply to compensated sureties. That court pointed out that "the surety law for compensated sureties must be found in the common law of this state. We note that Title 103 is largely a codification of the common law of surety and principal, and that many of the rules of surety law are the same or similar for compensated and uncompensated sureties. Thus we will look to Title 103, and the cases decided thereunder, as persuasive authority as

to the law governing compensated sureties. Whether particular rules established under that Title differ from the law to be applied to compensated sureties must be decided on a case-by-case basis." Id. at 463-464. No case prior to Balboa held that the discharge provision of Code Ann. § 103-205 (now O.C.G.A. § 10-7-24) applied to compensated sureties, and the common law in this state prior to the enactment of any such discharge provision neither compelled a creditor to sue a principal at the request of the surety nor discharged the surety for the creditor's failure to commence such an action. Howard v. Brown, 3 Ga. 523 (1847); Thomas v. Clarkson, 125 Ga. 72, 78 (3) (54 SE 77) (1906).

Although the Balboa court did not expressly overrule Houston Gen. Ins. Co. v. Brock Constr. Co., supra, it cannot be denied that the two holdings are contrary. The crux of the instant case therefore involves determining

which rule governs this particular dispute between the appellants and the appellee.

The overruling of a decision is generally retroactive, but retroactive application of a decision overruling a prior decision may be declined where unjust results would accrue to those who justifiably relied upon the prior rule. Walker v. Walker, 247 Ga. 502 (277 SE2d 45) (1981). See also Mutual Life Ins. Co. of N.Y. v. Barron, 70 Ga. App. 454, 463-464 (28 SE2d 334) (1943), and Flewellen v. Atlanta Cas. Co., 250 Ga. 709 (300 SE2d 673) (1983). At all pertinent times in this case, i.e., at the creation of the suretyship and notice by the surety demanding suit against the principal, the most recent pronouncement by the Georgia Supreme Court provided that Tile 103, which, of course, included the discharge provision in question, did not apply to compensated sureties. We therefore consider the appellants' reliance upon

that pronouncement to be justifiable, and the injustice of applying Balboa retroactively and thereby discharing the surety is obvious. Accordingly, we conclude that retroactive application of Balboa in this case was error and that summary judgment for the appellee was inappropriate."

Judgment reversed. Banke, C.J., McMurray, P. J., Pope and Benham, JJ., concur. Birdsong, P.J., Carley, Sognier and Beasley, JJ., dissent.

DECIDED JANUARY 8, 1985 -
REHEARING DENIED FEBRUARY 1, 1985 -
CERT. APPLIED FOR.

SOGNIER, Judge, dissenting.

"I respectfully dissent. The majority has determined that the Supreme Court's decision in Balboa Ins. Co. v. A.J. Kellos Constr. Co., 247 Ga. 393 (276 SE2d 599) (1981) implicity overruled its earlier decision in Houston &c. Co. v. Brock Constr. Co., 241 Ga. 460 (246 SE2d 316) (1978), and

by declining to apply Balboa retroactively, the indirect effect of the majority's opinion is to hold that the Supreme Court in Balboa established a new principle of law. See Flewellen v. Atlanta Cas. Co., 250 Ga. 709, 712 (300 SE2d 673) (1983).

I disagree. I find nothing contrary in the decisions of Balboa and Houston. Moreover, I find that the Balboa decision did not estalbish a new principle of law, but was instead, clearly foreshadowed by the warning in Houston that "[w]hether particular rules established under that Title [former Title 103, now O.C.G.A. § 10-7-1 et seq.] differ from the law to be applied to compensated sureties must be decided on a case-by-case basis." Id. at 464. (Emphasis supplied.)

Therefore I cannot agree with the majority's refusal to apply Balboa retroactively. In Flewellen, supra, which adopted the test in Chevron Oil Co. v. Huson, 404 U.S. 97 (92 SC 349, 30

LE2d 296) (1971) for retroactivity the Supreme Court stated that in deciding a retroactivity question the court should: "Consider whether the decision to be applied nonretroactively established a new principle of law, either by overruling past precedent on which litigants relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." Flewellen, supra, at 712. Balboa did not explicitly overrule any past precedent, and while the issue may have been one of first impression, the Balboa resolution was foreshadowed by the language used in Houston, supra at 464.

Although I feel that the Supreme Court's decision in Balboa is harsh in requiring one who has paid a surety to take additional steps before collecting from that surety the benefits for which one has paid, nevertheless the holding in Balboa is the law and we are constrained to follow it. I would

affirm the trial court's grant of appellee's motion for summary judgment.

I am authorized to state that Presiding Judge Birdsong, Judge Carley and Judge Beasley join in this dissent."

3. 42060. MORRISON ASSURANCE COMPANY V. PRESTON CARROLL COMPANY, INC., ET AL., 254 Ga. 608 (1985).

MARSHALL, Presiding Judge.

"We granted certiorari to resolve a perceived conflict between Houston Gen. Ins. Co. v. Brock Constr. Co., 241 Ga. 460 (246 SE2d 316) (1978), and Balboa Ins. Co. v. A.J. Kellos Constr. Co., 247 Ga. 393 (276 SE2d 599) (1981), in the 5-4 decision of the Court of Appeals in Preston Carroll Co. v. Morrison Assur. Co., 173 Ga. App. 412 (326 SE2d 486) (1985). The facts of the case are set out so far as they are material in the opinion of the Court of Appeals.

The issue is whether the legislature intended that compensated as well as uncompensated sureties be

governed by the provisions of Code Ann. § 103-205 (now O.C.G.A. § 10-7-24).[1] In Houston, supra, the court ruled on Code §§ 103-103, -203 (now O.C.G.A. §§ 10-7-3,-22) in Div.2, holding that they do not apply to compensated sureties. Although the focus was on those specific Code Sections, the court, in Div. 1, examined all of Title 103 and affirmed the ruling of the Court of Appeals "that Title 103 [with the exception of Code Ann. § 103-210] was not intended to govern compensated sureties." Houston, supra, p. 463. To

---

[1] "Any surety, guarantor, or endorser, at any time after the debt on which he is liable becomes due, may give notice in writing to the creditor, his agent, or any person having possession or control of the obligation to proceed to collect the debt from the principal or any one of the several principals liable therefor; and, if the credtor or holder refuses or fails to commence an action for the space of three months after such notice (the principal being within the jurisdiction of this state), the endorser, guarantor, or surety giving the notice, as well as all subsequent endorsers and all cosureties, shall be discharged . . ."

the extent that that ruling is broader than the specific issue in that case, i.e., as to Code §§ 103-103, -203, it is obiter dictum. That there was no intention to include the entire Title within the purview of that decision, is illustrated by the holding, on p. 464, that "Whether particular rules established under that Title differ from the law to be applied to compensated sureties must be decided on a case-by-case basis."

Balboa, 247 Ga. 393, supra, dealt solely with the issue of whether Code Ann. § 103-205 applies to compensated sureties (which we answered in the affirmative). We recognized, on p. 394, that the general ruling on all of Code Ann. Title 103, which we have quoted herein above from the Houston case, undoubtedly had prompted that certified question. Thus, as the dissenting opinion in the Preston Carroll Co. case, supra, stated it, Balboa, supra, did not explicitly overrule any past precedent

(including Houston, supra) and while the issue may have been one of first impression, the Balboa resolution was foreshadowed by the language used in Houston, supra at p. 464.

Accordingly, the trial court did not err in granting summary judgment in favor of the appellant surety, and the judgment of the Court of Appeals reversing the trial court's judgment must be, and is, reversed."

Judgment reversed. All the Justices concur.

DECIDED JUNE 19, 1985 -
REHEARING DENIED JULY 23, 1984.
Certiorari to the Court of Appeals of Georgia - 173 Ga. App. 412.

4. 42060. MORRISON ASSURANCE COMPANY V. PRESTON CARROLL COMPANY, INC., ET AL., (Ga. Sup. Ct., July 23, 1985).

"The Motion for a Rehearing was denied today."

Yours very truly,

MRS. JOLINE B. WILLIAMS,
Clerk

APPENDIX "C"

Excerpts from pleadings filed by Petitioners in state courts below raising the constitutional question:

1. MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR REHEARING FILED IN SUPREME COURT OF GEORGIA ON JULY 1, 1985, IN MORRISON ASSURANCE COMPANY V. PRESTON CARROLL COMPANY, ET AL., CASE NO. 42060.

"Appellees Preston Carroll Company, Inc. and CFW Construction Company, Inc. (hereinafter referred to as the "joint venture"), respectfully urge the Court for a rehearing of the Court's June 19, 1985 decision reversing the Court of Appeals in Preston Carroll Company, et al. v. Morrison Assurance Company, 173 Ga. App. 412 (1985), for the following reasons:

. . .

Although not specifically addressed in either majority or minority opinions

of the Court of Appeals, nor commented upon by the trial court, the joint venture nevertheless in each forum as in this one has argued that the retrospective application of Balboa to the joint venture would constitute a violation of the due process clause of the Fourteenth Amendment. Hence, retrospective application of Balboa not only is in derogation of the doctrine of nonretroactivity as adopted by this Court in Flewellan, the constitutional ramifications to the joint venture of such application is even of more serious import.

While prospective or retrospective application of state laws by a state supreme court is not, in and of itself, violative of the Fourteenth Amendment, Great Northern Railway Company v. Sunburst Oil & Refining Company, 287 U.S. 358, 77 L.Ed 360, 53 S.Ct. 145 (1932), it will if the law established by the "overruling" decision in combination with the procedural

circumstances which existed before the overruling case was decided has the total effect of denying a party all remedies for the enforcement of its rights. Brinkerhoff-Faris Trust & Saving Company v. Hill, 281 U.S. 673, 74 L.Ed. 1107, 50 S.Ct. 51 (1930).

. . .

It is respectfully submitted that Brinkerhoff applied to the instant case demands the same conclusion. The joint venture has been denied its right to be heard, its day in court, due to the retroactive application of Balboa. Relying as it did on the Houston holding, the joint venture fell victim to the same deprivation which the Brinkerhoff bank experienced in the Missouri Courts: a change in the rules so fundamental so as to deprive each plaintiff of its const utional guarantee to due process of law.

Prior to Balboa, the joint venture's rights as an obligee to the

Morrison performance bond were governed by the terms of that bond. With Balboa, Morrison found additional protection under Ga. Code Ann. § 103-205 as a compensated surety, and the joint venture's rights under Morrison's bond were irrevocably forfeited by the application to it of the ninety (90) day notice provisions of that statute after the fact. As such, if this Honorable Court's decision stands, the joint venture will be deprived of any opportunity to assert its rights under the bond which amounts in this case, for these reasons, to a taking without due process of law in violation of the Fourteenth Amendment. . . ."

2. REPLY BRIEF FILED IN GEORGIA COURT OF APPEALS ON SEPTEMBER 7, 1984 IN PRESTON CARROLL COMPANY, INC., ET AL. V. MORRISON ASSURANCE COMPANY, CASE NO. 69086.

. . .

"In conclusion, the Joint Venture would point out to the Court that the

retrospective application of Balboa alone or in conjunction with the retrospective application of the 1981 Amendment to the Joint Venture are proscribed by case and statutory authority and constitute an unconstitutional interference with contract rights in violation of both State and Federal Constitutions.

CONCLUSION

In conclusion, Morrison's brief raises two critical questions in the instant appeal: (1) should the Balboa decision be applied retroactively to the Joint Venture in light of the Georgia Supreme Court's adoption of the Chevron Oil test for the applicability of the doctrine of nonretroactivity, and (2) whether the retrospective application of Balboa by itself or in conjunction with the 1981 Amendment to Ga. Code Ann. § 103-101 is in violation of both State and Federal proscriptions against the application of ex facto

laws, the result of which is a taking of property rights without due process of law. For the reasons above, the Joint Venture strongly urges the Court to answer both questions in the affirmative, reversing the trial court's Order granting Morrison's Motion for Summary Judgment."

3. BRIEF FILED IN GEORGIA COURT OF APPEALS ON JULY 2, 1984 IN PRESTON CARROLL COMPANY, INC., ET AL. V. MORRISON ASSURANCE COMPANY, CASE NO. 69086.

. . .

ENUMERATIONS OF ERROR

1.

"THE TRIAL COURT ERRED IN GRANTING APPELLEE MORRISON ASSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT SINCE GRANTING THE MOTION CONSTITUTED A RETROACTIVE APPLICATION OF A GEORGIA SUPREME COURT DECISION WHICH REVERSED AN EARLIER GEORGIA SUPREME COURT DECISION UPON WHICH THE APPELLANTS JUSTIFIABLY RELIED, AND UPON WHICH THE APPELLANTS' CONTRACTUAL RIGHTS HAD ALREADY VESTED.

THE TRIAL COURT ERRED IN GRANTING APPELLEE MORRISON ASSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT SINCE GRANTING THE MOTION CONSTITUTED A RETROACTIVE APPLICATION OF A STATE STATUTE IN VIOLATION OF STATE AND FEDERAL CONSTITUTIONS.

. . .

It is clear under the State Constitution a statute does not apply retrospectively unless the General Assembly expressly provides for such application in futher proceedings and pending cases. Article I, Section III, Para. II (O.C.G.A. § 1-3-5). (Footnote omitted).

Enger v. Irwin, 245 Ga. 753 (1980). As stated by the Georgia Supreme Court in Todd v. Morgan, 215 Ga. 220 (1959), a statute is "retroactive" in its legal sense which

creates a new obligation on transactions or considerations already passed, or destroys or impairs vested rights. "Upon principle, every statute which takes away or impairs vested rights required under existing laws or creates a new obligation, imposes a new duty, or attaches a new liability in respect to transactions or considerations already passed, must be deemed retrospective." Id. at 222. The Enger Court quoting from its previous decision in F. H. Ross & Co. v. White, 224 Ga. 324 (1968), stated that "[i]t is well settled that a statute affecting substantive rights operates prospectively." Code § 102-104 [O.C.G.A. § 1-3-5]. Enger, supra, at 754. See, e.g., Hart v. Owens-Illinois, Inc., 161 Ga. App. 831 (1982).

On April 9, 1981, Ga. Code Ann. § 103-101 which previously distinguished between the surety (uncompensated surety) and guarantor (compensated surety) was repealed, and the following statute was passed in its place:

> 103-101. Definition. The contract of suretyship or guaranty is one whereby a person obligates himself to pay the debt of another in consideration of a benefit flowing to the surety or in consideration of credit or indulgence or other benefit given to his principal, the principal in either instance remaining bound therefor. Sureties, including those formally called guarantors, are jointly and severally liable with their principal unless the contract provides otherwise. There should be no distinction between contracts of suretyship and guaranty. [O.C.G.A. § 10-7-1].

To grant Morrison's motion is to give retrospective application of O.C.G.A. § 10-7-1, as amended, abolishing the distinction between guarantors and sureties, which in effect is to apply the protection of Ga. Code Ann. § 103-205 to compensated sureties. Such retrospective application is in violation of state statutory and appellate authority. It cannot be disputed that such an interpretation would irreparably destroy any

substantive rights which the joint venture had under its payment and performance bonds. There is no question that the joint venture did not initiate legal action against Morrison's principal within three months of the joint venture's notice to do so by the surety. The issue then is whether the 1981 version of Ga. Code Ann. § 103-205 abolishing the distinction between sureties and guarantors would be given effect where the obvious conclusion from the application of the earlier Houston decision would result in the opposite conclusion. That is, that Title 103 is not applicable to compensated sureties. Secondly, that in reference to the undisputed common law of Georgia confirms the inapplicability of this statute to compensated sureties." (Footnote omitted). . . .

4. MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MORRISON ASSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT FILED IN THE STATE COURT OF FULTON COUNTY ON APRIL 13, 1984, IN SYMONS CORPORATION V. SIMPLICITY BUILDERS, INC., ET. AL., CASE NO. 786053

. . .

"Thirdly, applying the Balboa decision retrospectively would constitute an unconstitutional taking of property of the joint venture without due process of law in violation of the Fourteenth Amendment of the United States Constitution.

. . .

Even without regard to the retrospective application of O.C.G.A. Section 10-7-1 to compensated sureties, it is nevertheless clear under a legion of Georgia appellate authority that on these facts the retrospective application of the Georgia Supreme

Court's decision in Balboa is not only unwarranted under State law but also constitutes an unconstitutional taking of property without due process of law in violation of the Fourteenth Amendment of the United States Constitution.

As explainted above, the Georgia Supreme Court in Balboa expressly recognized in its holding that O.C.G.A. Section 10-7-24 did in fact apply to compensated sureties was in direct contravention to what it stated ealier in its Houston decision when it made the blanket assertion that "with the exception of Code Ann. Section 103-210 (enacted in 1973), (Tile 103) 'was not intended to govern compensated sureties.'" 247 Ga. at 394.

While the general rule in the State of Georgia appears to be that the effect of a judicial reversal of earlier decisions is retrospective, there is an exception to the general rule as recognized by the Georgia Court of Appeals in Mutual Life Insurance Co. v.

Barron, 70 Ga. App. 454, 463-64 (1943), which is that

> [a]n overruling decision cannot operate retrospectively so as to impair the obligations of contracts entered into, or injuriously affect vested rights acquired in reliance on the overruled decision. 21 C.J.S. 328, § 194.

It is clear that the joint venture's rights under the performance and payment bonds were vested upon the execution of said bonds, and its actions to enforce those rights were dictated by the Georgia Supreme Court's decision in Houston. For the Court to apply Balboa retrospectively would result in the divestiture of the joint venture's rights.

A second exception to the general rule cited in Barron, supra, has been enunciated by the Georgia Supreme Court in Walker v. Walker, 247 Ga. 502 (1981). That is where "unjust results" would come to those who justifiably relied on the earlier decision. . . .

It is clear that the surety relies heavily on the Balboa decision as support for its motion for summary judgment. It is equally clear that the retrospective application of the Balboa decision in the instant case will not only destroy those vested contractual rights acquired by the joint venture under the payment and performance bonds in accordance with the construction of O.C.G.A. Section 10-7-24 of the Houston decision, but that retrospective application of Balboa will clearly and unquestionably constitute a grave injustice to the joint venture which had justifiably relied upon the prior Houston decision.

CONCLUSION

Therefore, there is amply authority for both propositions which the joint venture asserts in opposition to the surety's motion for summary judgment. First, for the Court to apply Section 10-7-24 to the instant

compensated surety will in actuality be applying the 1981 statute abolishing the distinction between sureties and guarantors to the instant case, O.C.G.A. Sec. 10-7-1, in violation of both state and federal constitutions and controlling appellate authority. . . .

Finally, it would constitute an unconstitutional taking of contractual property rights of the joint venture without due process of law in violation of the Fourteenth Amendment of the United States Constitution."

Supreme Court, U.S.
FILED
DEC 16 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-852

PRESTON CARROLL COMPANY, INC. and
C.F.W. CONSTRUCTION COMPANY, INC.,
Petitioners for Certiorari

v.

MORRISON ASSURANCE COMPANY, Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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STATEMENT OF THE CASE

Any defects or omissions in the Statement submitted by Petitioners (hereinafter sometimes referred to as the "Joint Venture") are in the nature of argumentative assertions and are responded to in the body of Respondent's Brief.[1]

1. Pursuant to Rule 28.1, United States Supreme Court Rules, Respondent informs the Court that Morrison Assurance Company is wholly owned by First Southern Insurance Company, which is wholly owned by First Southern Financial Corporation.

SUMMARY OF THE ARGUMENT

This case presents no significant federal question, and indeed the only potential federal question ought not to be reached at all. The only federal question which might be reached is whether the Georgia Supreme Court transgressed Petitioners' right to due process of law by retroactively applying a prior decision which overruled a still-earlier case. The Georgia Supreme Court held that the prior decision did not overrule the earlier case; the two earlier decisions were consistent. This holding was a determination of state law and should not be disturbed.

ARGUMENT

I. THE PRESENT CASE TURNS PRIMARILY ON CONSIDERATIONS OF STATE SUBSTANTIVE LAW AND INVOLVES NO IMPORTANT NEW QUESTIONS OF FEDERAL LAW, NOR DOES THIS CASE RAISE ANY ISSUES WHOSE IMPACT EXTENDS BEYOND THE IMMEDIATE PARTIES.

The Joint Venture argues that it has been denied due process of law under the Fourteenth Amendment of the Constitution, and that the decision of the Georgia Supreme Court in this case violated the "doctrine of nonretroactivity" set out in Chevron Oil Company v. Huson, 404 U.S. 97, 92. S.Ct. 349, 30 LEd2d 296 (1971) (hereinafter referred to as "Chevron Oil"). Having

asserted what seem to be two legal bases for its Petition, the Joint Venture then goes on to describe this case as an "opportunity for this Court to clarify its holding in Chevron Oil". Petitioners' Brief at 19. Petitioners' arguments reveal either a strained attempt to create an issue that satisfies the requisites of Rule 17 of the Rules of the Supreme Court ("Considerations Governing Review on Certiorari") or a fundamental misunderstanding of federalism.

The Due Process Clause is applicable to the states in the exercise of their sovereign power, and it establishes the outermost limits of such power. The sovereign power of a state is usually expressed by legislative acts

and implemented by the executive branch, and the Due Process Clause is most commonly regarded as a limitation on such expressions and implementations of power.

In the case of Brinkerhoff-Faris Trust and Savings Co. v. Hill, 281 U.S. 673, 74 L.Ed. 1107, 50 S.Ct. 51 (1930), however, this Court established that the Fourteenth Amendment may also limit the power of a state judicial body to overrule past precedent under certain limited circumstances. The situation presented in the Brinkerhoff case involved a litigant who had been denied a forum -- any forum at any time -- in which to assert its right to seek an abatement of a portion of a state tax assessment. This complete denial of any opportunity to litigate its rights had

been brought about by a decision of the state supreme court which clearly and expressly overruled a prior decision of the same court regarding the proper forum in which to seek such an abatement. The overruling of the prior decision had the effect of requiring the plaintiff to have pursued a remedy which in fact never existed. This Court concluded that the absolute lack of any opportunity for the plaintiff to assert its rights at any time denied that plaintiff the due process required by the Constitution. Brinkerhoff therefore established that the Due Process Clause will bar the retroactive application of a state court decision where that decision:

1. expressly overrules past precedent; and

2. results in a "deprivation of plaintiff's property . . . without its ever having had an opportunity to defend against the [taking]." (Emphasis added) Brinkerhoff at 679, 453.

The decision in Brinkerhoff goes so far, and no further. In particular, the Brinkerhoff decision leaves intact the right of a state supreme court to determine questions of state law free from oversight by the federal courts, at least in the absence of patent abuse. This court in Brinkerhoff observed that "the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decision on which a party relied, does not give rise to a claim under the Fourteenth Amendment or

otherwise confer appellate jurisdiction on this court." (Emphasis added.) Brinkerhoff at 680, 454. (See also Brinkerhoff at 680, 454, footnote seven.)

To the extent that the doctrine of nonretroactivity set out in Chevron Oil is more restrictive of a court's power to give retroactive effect to its rulings than the Constitution, then Chevron Oil would not be applicable by its own force to state courts. The reason for this conclusion is obvious. The limitations of the Fourteenth Amendment apply directly to the exercise by the states of their sovereign power. However, mere federal decisional law, regardless of whether it may be grounded in sound common law precedent or based upon enlightened equitable principles, is not

binding authority upon state courts. Similarly, no matter how admirable the considerations set forth in Chevron Oil, or how beneficial the test, that case does not bind the Georgia Supreme Court. Accordingly, this case presents no "opportunity" for this Court to elaborate on its holding in Chevron Oil.

II. THE HOLDING BY THE GEORGIA SUPREME COURT THAT ITS TWO PRIOR DECISIONS WERE CONSISTENT -- AND THAT THERE WAS THEREFORE NO RETROACTIVE APPLICATION OF LAW SUCH AS MIGHT VIOLATE DUE PROCESS -- SHOULD NOT BE SUBJECT TO REVIEW ON CERTIORARI UNLESS THE GEORGIA COURT ACTED IN A MANNER THAT WAS PATENTLY EVASIVE OF OR DISCRIMINATORY AGAINST FEDERAL RIGHTS.

The true essence of the Joint Venture's arguments is that the Georgia Supreme Court has erred in reconciling

its two prior decisions; and that the later of these two prior decisions actually did overrule the earlier so as to trigger due process protections. However the determination by the Georgia Supreme Court in this case that its two prior decisions were consistent was a holding going to substantive state law, and it should not be subject to review on certiorari.

The role of a state court in elucidating the character of one of its own decisions -- an unusual topic -- was addressed by this Court in the case of Tibbs v. Florida, 457 U.S. 31, 46-47, 102 S.Ct. 2211, 2221, 72 LEd2d 652 (1982). That case concerned the application of the Double Jeopardy Clause in a Florida murder prosecution. The defendant in

that case was convicted by the jury and sentenced to death, but the conviction was overturned by the Florida Supreme Court, which found numerous "weaknesses" in the evidence produced by the State. Id. at 35-36, 2214-2215. The Florida Supreme Court remanded the case, but before a new trial was commenced this Court decided the cases of Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) and Greene v. Massey, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978). Stated concisely, the holding in Burks and Greene were to the effect that the Double Jeopardy Clause bars a second trial after an appellate court has found that the evidence presented by the state in the first trial was insufficient to sustain a conviction. The Florida trial

judge subsequently determined that a retrial of Mr. Tibbs would violate the double jeopardy principles articulated in those cases and dismissed the prosecution. The State of Florida then appealed the trial court's refusal to retry the defendant, confronting the Florida Supreme Court with the task of analyzing and explaining the reference to "weaknesses" in the prior decision it had rendered in the same case. Tibbs at 37-38, 2215-2216. In the second appeal, the Florida Supreme Court held that its first decision was based upon the weight of the evidence, and not upon the sufficiency of the evidence, that Burks and Greene were not applicable, and that

the defendant could be retried without offending the Double Jeopardy Clause. Id.

Upon certiorari, this Court affirmed the substantive conclusions of the Florida Supreme Court regarding applicability of the Double Jeopardy Clause. More relevantly to the present case, this Court also recognized the validity of a state court's construction of its own prior opinion:

> Any ambiguity in Tibbs I, finally, was resolved by the Florida Supreme Court in Tibbs II. Absent a conflict with the Due Process Clause . . . that court's construction of its prior opinion binds this Court."

Tibbs at 47, 2221. The attitude thus articulated is one of deference to a state court in establishing, as a matter

of law, the meaning of its own past pronouncements. Such deference is an aspect of the deference accorded state courts in construing state substantive law generally, and stands on the same judicial principles of federalism and comity.

The deference accorded a state court is not without limit. As stated in Tibbs, supra, the limit is determined by the Due Process Clause. In order to preserve and protect due process limitations, this Court may be called upon to examine the review provided by a state supreme court in order to determine that that review was not patently evasive of or discriminatory against federal

rights. Cf. Fay v. Noia, 372 U.S. 391, 432, 83 S.Ct. 822, 845, 9 L.Ed.2d 837 (1963).

In Fay, Justice Brennan, speaking for the Court, noted the general policy of declining to review federal questions which may have been involved in a decision by a state supreme court if there were adequate and independant state substantive grounds to support the outcome reached by the state court. The Justice observed that the United States Supreme Court "has deferred to state substantive grounds so long as they are not patently evasive or discriminatory against federal rights . . . " Id.

The limits on federal deference to a state court's determination of state law referred to in Tibbs, clearly do not

require this Court to act as a state supra-supreme court by providing an appellate review de novo of questions of state substantive law. The issue now before this Court, then, is not whether the Georgia Supreme Court was correct in concluding that the holdings in two of its own previous cases were consistent--which it was--but whether the review provided by the Georgia Supreme Court was so egregiously and obviously erroneous as to be patently evasive or discriminatory against federal rights. It was not.

III. THE SUBSTANTIVE CONCLUSIONS REACHED BY THE GEORGIA SUPREME COURT IN THIS CASE DID NOT VIOLATE THE "PATENTLY EVASIVE OR DISCRIMINATORY AGAINST FEDERAL RIGHTS" STANDARD SET OUT IN FAY v. NOIA, AND IN FACT RESULTED IN A SOUND DECISION.

The substantive issues in this case involve a series of decisions by both the Georgia Court of Appeals and the Georgia Supreme Court dealing with the various provisions of Title 103 of the Georgia Code Annotated, which in turn dealt generally with surety or guarantor relationships.

The first relevant case, and the case which established the analysis which guided every subsequent relevant decision, was Traveler's Indemnity Company v. Sasser and Company, 138 Ga. App. 361, 364, 226 S.E.2d 121. (1976). The Court of Appeals in Sasser addressed the question of the applicability of a specific statute within Title 103 to a situation involving a compensated surety, and held that:

> Code §103-202 . . . does not here apply where the defendant is a compensated surety. Such compensated sureties are treated as guarantors under Code §103-101 since there is consideration flowing to the defendant for granting and issuing the bond.

Sasser at 123. Code §103-101, a definitions provision expressly defined the term "surety" as referring to an uncompensated surety, while a "guarantor" received a benefit for its undertaking. The section analyzed in Sasser referred only to sureties.

A year later the Georgia Court of Appeals in Noland Company v. Commercial Insurance Company, 141 Ga. App. 285, 233 S.E.2d 259 (1977) applied the statute involved in the present case to discharge what was obviously a compensated corporate surety. However, the court in

Noland did not expressly address the question of the distinction between sureties and guarantors.

Next, in Brock Construction Company, Inc. v. Houston General Insurance Company, et al., 144 Ga.App. 860, 243 S.E.2d 83 (1978), the Court of Appeals adopted the reasoning applied in Sasser in holding that yet another statute within Title 103 did not apply to compensated sureties:

> The import of Sasser is clear; compensated corporate sureties engaged in writing surety bonds for a profit are not such sureties within the meaning of Title 103 so as to generally enjoy the protection afforded by all of its sections." (Emphasis added.)

Houston, 144 Ga. App. at 861. (A close reading of the Court of Appeals decision in Houston reveals that all of its statements regarding Title 103 are carefully qualified in light of the rational underpinnings of the Court's holding.) The court then found that the common law produced the same result for the compensated surety in that case as the statute would have for an uncompensated surety.

The Georgia Supreme Court granted certiorari to review the decision in Houston, and affirmed the Court of Appeals' holding in its entirety. Houston General Insurance Company, et al v. Brock Construction, Inc., 241 Ga. 460, 264 S.E.2d 316 (1978). Presumably because almost all of the statutes

contained in Title 103 did refer only to sureties, the opinion of the Georgia Supreme Court also contained the following statement: ". . .Title 103 was not intended to govern compensated sureties." Houston at 463. However, the Georgia Supreme Court cautioned that "[w]hether particular rules established under that Title [103] differ from the law to be applied to compensated sureties must be decided on a case-by-case basis." Houston at 464.

After the Georgia Supreme Court's decision in Houston, a question was certified to the Georgia Supreme Court from the United States Court of Appeals for the Eleventh Circuit inquiring specifically whether Section 103-205 of the Georgia Code, the provision involved

in the present case, applied to compensated sureties. In Balboa Insurance Company v. A. J. Kellos Construction Company, 247 Ga. 393, 276 S.E.2d 599 (1981), the Georgia Supreme Court held that Section 103-205 did apply to compensated as well as uncompensated sureties. That holding was based upon the same reasoning and analysis utilized in the Houston decision. The Court concluded that Section 103-205 clearly must apply to compensated sureties because Section 103-205 by its own terms included "guarantors" within its scope, and guarantor was defined in Section 103-101 as meaning a compensated surety.

In the present case, the Georgia Supreme Court was called upon to look back and reexamine its holdings in

Houston and Balboa. What it saw was two cases governed by the same reasoning and analysis. That reasoning and analysis had previously been enunciated -- perhaps more clearly -- by the Georgia Court of Appeals in two opinions, including the opinion affirmed in Houston. Moreover, the only previous case to actually apply the specific statute in question had applied that statute to discharge a compensated surety, as in both Balboa and the present case.

The Georgia Supreme Court also recognized that some of the language in its opinion in Houston was overly broad, and it has properly characterized that language as obiter dictum, upon which the Joint Venture was not entitled to rely. Not only was this characterization not

patently evasive of or discriminatory against federal rights, it was also fundamentally correct.

The distiction between holding and dictum is not new, and it is essential to a legal system in which judicial determinations must be justified but also must be limited to the controversy before the Court. In Cohen v. Virginia, 6 Wheat 264, 399, 5 L.Ed. 257, 290 (1821), Justice Marshall expressed the principle as follows:

> It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not control the judgment in a subsequent suit, when the very point is presented for decision. The reason for this maxim is obvious. The question actually before the Court is investigated with care and considered in its full

> extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

This Court also observed in United States v. Eaton, 169 U.S. 331, 348, 18 S.Ct. 374, 42 L.Ed. 767, 773 (1897), that "[g]eneral language in an opinion must be confined to the precise state of facts with reference to which it was used and does not warrant the inference that it was intended to overrule a doctrine laid down in previous cases which are not even referred to." And in United Gas Improvement Company v. Continental Oil Company, 381 U.S. 392, 404, 85 S.Ct. 1517, 14 L.Ed 2d 466, 474 (1965), this

Court conceded that language in previous case was "unquestionably broad," but went on to observe that:

> Concepts of stare decisis in statutory interpretation apply to the holdings with which the case-by-case method of decision surrounds a statute. To recognize no difference between the transfers [in the earlier case] and those in issue here, and in the name of stare decisis to hold that Commission jurisdiction depends on the form rather than the substance of the transaction, would turn the case-by-case process against itself. (Emphasis in original.)

> The thrust of these admonitions is clear: only the holding of a court on the precise controversy before it is the law for purposes of stare decisis, and successive opinions shall not be read so as to produce a conflict. The decision of the Georgia Supreme Court in this case was in accord with these principles and was correct.

CONCLUSION

Petitioners would have this Court conduct what would be the third appellate review of the relationship between the Houston and Balboa decisions, and substitute its opinion for that of the Georgia Supreme Court. Respondents

respectfully contend that the Georgia Supreme Court's conclusion was a legitimate determination of state substantive law which precluded reaching Petitioners' federal claims, and that the Petition should there be denied.

Respectfully submitted,

DeWitte Thompson,
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AFFIDAVIT OF SERVICE

COMES NOW, DeWitte Thompson, who after being duly sworn deposes and states:

I have this day served Henry Angel, Esq., Attorney for Petitioners with three copies of this OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA by depositing copies of same

in the United States Mail with adequate postage thereon addressed as follows:

Henry Angel, Esq.
SAVELL, WILLIAMS, COX
and ANGEL
2300 The Equitable Bldg.
100 Peachtree Street
Atlanta, Ga. 30343-6201

This 13th day of December, 1985.

DeWitte Thompson,
Attorney for Respondent

Sworn to and subscribed before me this
13th day of December, 1985

Notary Public
Jeff B. Slagle
My commission expires July 26, 1987.